

Racing Association of Central Iowa d/b/a Prairie Meadows Racetrack and Casino and International Brotherhood of Electrical Workers, Local Union 347, AFL-CIO, Petitioner and American Federation of State, County and Municipal Employees, Council 61, a/w American Federation of State, County and Municipal Employees, AFL-CIO, Petitioner/Intervenor and International Union of Operating Engineers, Local 234, a/w International Union of Operating Engineers, AFL-CIO, Intervenor. Cases 18-RC-15972, 18-RC-15997, and 18-RC-15998

September 30, 1997

DECISION ON REVIEW AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

The issue before us is whether the National Labor Relations Board should decline jurisdiction in a proceeding involving certain employees who work at the Employer's racetrack and casino. The employees in question perform building maintenance, slot machine, housekeeping, food service, parking, and customer service duties.

Pursuant to Board precedent¹ and Section 103.3 of the Board's Rules and Regulations,² the Board has declined to assert jurisdiction over proceedings involving the horseracing industry. The Board does, however, exercise jurisdiction over casino gambling.³

Local Union 347 of the International Brotherhood of Electrical Workers, AFL-CIO (IBEW), the Petitioner in Case 18-RC-15972, seeks to represent a unit of carpenters, electricians, electronics specialists, HVAC employees, plumbers, locksmiths, and general maintenance employees whose principal function is to service the Employer's grandstand facility. AFSCME/Iowa

¹ See, e.g., *American Totalisator Co.*, 243 NLRB 314 (1979); *Centennial Turf Club*, 192 NLRB 698 (1971); and *Walter A. Kelley*, 139 NLRB 744 (1962).

² Sec. 103.3 of the Board's Rules and Regulations provides:

The Board will not assert its jurisdiction in any proceeding under sections 8, 9, and 10 of the Act involving the horseracing and dogracing industries.

The rule was promulgated in 1972, pursuant to an amendment to Sec. 14 of the Act permitting the Board to decline jurisdiction of certain labor disputes:

Sec.14(c)(1) The Board, in its discretion may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction

²⁹ U.S.C. § 164(c)(1).

³ See *El Dorado Club*, 151 NLRB 579 (1965).

Council 61 and Operating Engineers Local 234 both intervened.⁴

During the pendency of the IBEW proceeding, AFSCME filed two of its own petitions: Case 18-RC-15997, seeking a unit of casino gaming employees who are said to perform "exclusively" casino work; and Case 18-RC-15998,⁵ seeking a unit of casino gaming, kitchen, food and beverage, housekeeping, parking, and customer service employees who are said to perform "predominantly" casino work. Both IBEW Local 347 and Operating Engineers Local 234 filed position statements in those proceedings, although they did not formally intervene.

A hearing was held on the IBEW petition in which evidence on both the jurisdictional and unit issues was taken. After the hearing, the Regional Director concluded that the Board would decline to assert jurisdiction because the Employer is "involv[ed]" in the horseracing industry within the meaning of Section 103.3 of the Board's Rules and Regulations. Based on the same jurisdictional analysis, the Regional Director administratively dismissed both AFSCME petitions prior to hearing.

All three Unions filed timely requests for review of the Regional Director's decisions and filed supporting briefs. The Petitioners and the Intervenor make two contentions: that the Board should assert jurisdiction in these cases because the Employer's primary business is the operation of a casino; and that, in any event, Rules Section 103.3 should be rescinded as ill-founded and anachronistic.

We granted review.⁶ Because the three cases involve the same Employer and raise the same issue concerning exercise of the Board's discretionary jurisdiction, we consider them together.

We have reviewed the record in light of the Petitioner's and Intervenor's briefs and, for the reasons which follow, we reverse the Regional Director and remand these cases to him for further appropriate action consistent with this Decision on Review and Order.

The Employer, Racing Association of Central Iowa d/b/a Prairie Meadows Racetrack and Casino, operates a racetrack and casino outside Des Moines known as Prairie Meadows. Prairie Meadows opened as a thoroughbred racetrack on March 1, 1989. The facility's

⁴ AFSCME/Iowa Council 61 is affiliated with the American Federation of State, County, and Municipal Employees, AFL-CIO. Operating Engineers Local 234 is affiliated with the International Union of Operating Engineers, AFL-CIO.

⁵ The original petition in Case 18-RC-15998 included security employees. On June 5, 1997, AFSCME filed a motion to strike security employees from the petition on the grounds that AFSCME cannot represent them and another union is interested in representing them. We grant the motion.

⁶ On November 22, 1996, the Board granted review in Case 18-RC-15972. In a separate Order of the same date, the Board granted review of the administrative dismissals in Cases 18-RC-15997 and 18-RC-15998.

construction was supported by bonds issued by Polk County, Iowa. Prairie Meadows operated exclusively as a track for the next three seasons, but, except for the first few weeks, lost money steadily. Late in 1991, the Employer filed a petition in bankruptcy under Chapter 11 of the Bankruptcy Code. Live racing ceased entirely for a year, although simulcasting of races from other tracks continued. Renewed activity commenced when the Iowa statutes were amended to permit slot machines to be installed at Prairie Meadows.

In 1994, Polk County obtained title to all track facilities in exchange for issuing new bonds to retire construction debts and to finance extensive remodeling of the grandstand to accommodate 1100 slot machines. The facility reopened as a racetrack and casino on April 1, 1995. Following opening of the casino, the Employer's finances underwent a dramatic reversal.

Within the first year, the Employer was able to repay \$46 million of its debt to Polk County and to commence repayment of the debts discharged in bankruptcy. The Employer expected to retire the Polk County debt and to regain title to the facility well ahead of schedule. By May 1996, the casino accounted for 98 percent of the Employer's revenue. Casino income in the first 5 months of 1996 was \$697 million. By comparison, live racing and simulcasting brought in \$14 million.

Casino profits enabled the Employer to resume its racing program. There was a 62-day season in 1996. Between 115 and 145 live racing days were planned for 1997. In addition to subsidizing track operations, casino revenues have substantially augmented racing purses. The Employer concedes that it cannot exist profitably as a racetrack alone.

The advent of the casino enterprise resulted in greatly increased staff and hours of operation. Formerly open only in the evenings during seasonal race meets, Prairie Meadows is now open 24 hours a day, 365 days a year. Food and beverage services are continuously available. Before the installation of the slot machines, Prairie Meadows had 375 employees, of whom 125 were year round. The facility now has a staff of over 1300, of whom 1050 are year round. Casino attendance is so great that total attendance does not increase substantially during the racing season.

We recognize that the Employer began operations as a racetrack, and that the purpose of opening the casino was to salvage and enhance the Employer's live racing program. Nevertheless, these factors are overridden by others that are more persuasive and more germane to collective bargaining: (1) the vast majority of the Employer's present employees were hired only after the casino opened; (2) the vast majority of the Employer's present job descriptions are for positions related solely or predominantly to operating the casino; and (3) when

the casino opened, the staff changed from predominantly seasonal to predominantly year round, with the year round staff increasing tenfold. The casino generates 98 percent of the Employer's income, with less than 2 percent deriving from parimutuel wagering. Racing patrons make up only a small proportion of overall attendance.

To conclude that an enterprise with these characteristics is essentially a racetrack is to allow the tail to wag the horse. The current reality is that the vast bulk of the Employer's income, operations, and staff is connected to its casino, and that without the casino the racetrack would not exist. In our view, the Employer's primary enterprise is now its casino operation, with horseracing a comparatively minor aspect of the business. To hold otherwise would elevate form over substance.

The work the employees do illustrates why this is so. The IBEW seeks to represent the Employer's grandstand maintenance crew, a unit of both skilled and unskilled employees who maintain and repair the building that houses the casino and provides seating for racing patrons. Employees in the crew's general maintenance classification attend to simple repairs, painting, changing lightbulbs, and the like. For skilled jobs, an employee from the appropriate craft is dispatched. The craft employees perform all skilled work up to the slot machine pedestals. By law, only slot machine technicians may wire, service, and repair the slot machines themselves.⁷

We recognize that employees in the grandstand maintenance unit perform some assignments in the backstretch, the area behind the grandstand that is devoted essentially to horseracing. However, this is not persuasive. First, the clear majority of their work is in the grandstand. Separate crews, none of which is included in the unit sought, maintain the track, the horse barns, the grounds, and the Employer's vehicles. Second, even though the grandstand also serves racing patrons, the slot machine casino does far more business, with more staff for more patrons and for longer hours, than the racetrack. Under these circumstances, we think it reasonable to view the grandstand as predominantly serving casino patrons.

Like the grandstand maintenance unit, the two units AFSCME seeks to represent appear to have little or no direct involvement with live racing.⁸ AFSCME characterizes the units as "exclusively" casino and "predominantly" casino. The "exclusively" casino unit includes cage bankers, cashiers, runners, coin counters,

⁷ Slot machine technicians are included in the units AFSCME seeks.

⁸ AFSCME introduced some evidence about the units it has petitioned for at the hearing in Case 18-RC-15972; however, as there were no hearings on its petitions, unit issues have not yet been fully litigated.

slot machine attendants and change sellers, and slot machine technicians. The “predominantly” casino unit adds housekeepers, kitchen and banquet employees, bartenders, food servers, bussers, concession attendants, parking attendants, seamstresses, and various clerks and guest services representatives.

None of the employees in any of the three units is a jockey, trainer, groom, or parimutuel betting agent, like employees the Board has declined to protect in the past.⁹ Rather, they fall into classifications not traditionally associated with or functionally integrated with horseracing. In this regard, we note that the Board has regularly asserted jurisdiction over nonracing enterprises at racetracks.¹⁰

In sum, we conclude that the enterprise here is predominantly a casino and the employees are predominantly casino employees. In these circumstances, Section 103.3 of the Board’s Rules and Regulations does

⁹ See, e.g., *American Totalisator Co.*, 243 NLRB 314 (1979); and *Walter A. Kelley*, 139 NLRB 744 (1962). But see *American Totalisator Co.*, 264 NLRB 1100 (1982).

¹⁰ See, e.g., *Waterford Park, Inc.*, 251 NLRB 874 (1980) (inn); and *Ogden Food Service Corp.*, 234 NLRB 303 (1978) (food concession).

not apply. In reaching this conclusion, we need not disturb Section 103.3 and related precedent as to those employees engaged exclusively in horse-related or parimutuel pursuits. Rather, we are concluding that the facts here present a different kind of industry from those as to which the Board has declined to assert jurisdiction.¹¹

Based on the foregoing, the Regional Director’s dismissal of the petition in Case 18–RC–15972 and administrative dismissal of the petitions in Cases 18–RC–15997 and 18–RC–15998 is reversed. We reinstate the petitions and remand the cases to the Regional Director for further appropriate action.

ORDER

The petitions in Cases 18–RC–15972, 18–RC–15997, and 18–RC–15998 are reinstated and remanded to the Regional Director for further appropriate action consistent with this Decision on Review and Order.

¹¹ Chairman Gould concurs in the result reached by his colleagues. However, he disagrees with Sec. 103.3 and those cases applying Sec. 103.3. In his view, there is no basis for the Board’s stance of declining jurisdiction over the horse and dog racing industries.